M.D. Miller Trucking & Topsoil, Inc. *and* General Teamsters Local Union No. 179, affiliated with the International Brotherhood of Teamsters. Case 13–CA–104166

April 12, 2017

SECOND SUPPLEMENTAL DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On November 4, 2016, Administrative Law Judge John T. Giannopoulos issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board orders that the Respondent, M.D. Miller Trucking & Topsoil, Inc., Rockdale, Illinois, its officers, agents, successors, and assigns, shall make whole Edward McCallum as follows:

1. Pay to McCallum the following amounts:

Net backpay:	$145,714.00
Health insurance expenses:	6,224.98
Search for work expenses:	38.00

plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.

2. Pay McCallum $7,984.00 for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), and *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

3. Pay Local 179 Pension Fund $15,876.00 on behalf of McCallum, plus interest accrued to the date of payment at the rate provided for in the applicable fund documents and any penalties.

Dated, Washington, D.C. April 12, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin McCormick, Esq., for the General Counsel.
Michael R. Lied, Esq. (Howard & Howard, P.L.L.C.), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This is a supplemental proceeding to determine the amount of backpay M.D. Miller Trucking & Topsoil, Inc. (Respondent or M.D. Miller) owes Edward McCallum (McCallum) based upon a December 16, 2014, Decision and Order by the National Labor Relations Board (Board). The hearing in this matter was held on May 9 and July 6, 2016, in Chicago, Illinois. Both the General Counsel and Respondent presented witness testimony, including the testimony of McCallum, along with documentary evidence. Based upon the entire record, including by observation of the demeanor of the witnesses, and considering the briefs filed by the General Counsel and Respondent, I make the following Findings of Fact and Conclusions of Law.[1]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the background section of his decision, the judge inadvertently stated that the Respondent's owner, Marlene Miller, called discriminatee Edward McCallum "stupid" and swore at him. However, in the underlying decision, the Board adopted the judge's finding that these statements were made by the Respondent's supervisor, Chad Miller. 361 NLRB No. 141 (2014). This inadvertent finding does not affect the result herein.

[2] There are no exceptions to the judge's findings that the Respondent owes McCallum $6,224.89 for health insurance expenses and $38 for his search-for-work expenses.

[1] The joint motion to supplement the record by placing R. Exhs. 7–10 into the record is granted. These Exhibits were admitted into the record at hearing, but were inadvertently excluded from the official record prepared by the court reporter.

I. FACTS

A. Background

The facts surrounding McCallum's employment history at M.D. Miller are fully set forth in *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141 (2014). Briefly, from April 2002 until April 11, 2013, McCallum worked for Respondent hauling construction material and debris to and from jobsites. Respondent's drivers work seasonally—in the spring, summer, fall, and early winter; the operation closes when the weather is poor in the winter and employees return in the spring. General Teamsters Local Union No. 179, affiliated with the International Brotherhood of Teamsters (Union) represents Respondent's drivers. In May 2010, McCallum was diagnosed with multiple sclerosis, causing him difficulty with his left leg.[2]

On April 11, 2013, Respondent's owner and president, Marlene Miller held a group meeting for drivers, telling them the company was having economic problems and asking drivers to either take a pay cut or come up with alternatives to allow the company to stay in business. McCallum spoke out against the plan and Miller called him "stupid" and swore at him. After McCallum asked her not to speak to him in such manner, Miller fired McCallum for insubordination.

On April 22, Respondent was to ordered reinstate McCallum with backpay, as a result of a grievance filed by the Union on McCallum's behalf.[3] Instead of reinstating McCallum, later that day Miller left him a voicemail saying he needed to submit a "long form" medical examination report before he could return to work. McCallum delivered a long form report, dated 1 month earlier, but Miller asked him to get a second opinion. On May 9, 2013, McCallum was examined by a doctor certified by the Federal Motor Carrier Safety Association, who gave him another long form examination report clearing him to drive, along with a Department of Transportation medical card. McCallum tried to contact Respondent about his medical clearance, but Respondent never responded; McCallum was never reinstated. The Board found that Respondent violated Section 8(a)(1) and (3) of the Act when it refused to accept McCallum's current medical certification and requiring him to complete multiple medical certifications before he could return to work.[4]

Because Respondent did not comply with the Board's Order, on May 29, 2015, the Regional Director for Region 31 issued a compliance specification and notice of hearing (Specification), alleging the amounts owed to McCallum. (GC Exh. 1(c).)[5] "On June 29, the Respondent filed an answer to the Specification (Answer), asserting that: (a) McCallum could not be reinstated because he lacked the required medical certification to work; (b) McCallum lacked medical certification throughout the entire backpay period; (c) the Regional Director's calculations conflicted with pay documents that Respondent attached to its answer; and (d) the Respondent lacked sufficient information to respond to the Regional Director's calculations." *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49 (2015), slip. op. at 1.[6]

Based upon the Answer, the General Counsel moved for summary judgment, and on November 25, 2015, the Board issued a Supplemental Decision and Order granting in part, and denying in part, the General Counsel's motion. Id. The Board granted summary judgment with respect to the backpay period (specification pars. I and XV), gross backpay calculations (specification par. III), pension fund contributions (specification pars. IX–XI), and excess tax allegations (specification par. XIII). Id. at 2–3. The Board denied summary judgment regarding the allegations involving interim earnings, expenses, and net backpay (specification pars. IV–VII) finding that "[w]here information is not within the respondent's knowledge, such as a discriminatee's interim earnings and expenses, a general denial is sufficient to warrant a hearing on those issues." Id. at 3. Therefore, the Board ordered a hearing limited to the issues of McCallum's interim earnings, expenses, and net backpay.[7] Id.

At the hearing ordered by the Board both the General Counsel and Respondent presented witness testimony, including the testimony of McCallum, along with documentary evidence related to the issues set forth by the Board. Based upon the entire record, including the observation witness demeanor, and considering the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.

B. McCallum's Search for Work and Interim Earnings

McCallum testified about his search for work and interim earnings.[8] According to McCallum he was available to work at all times after being fired by Respondent, and maintained his commercial driver's license (CDL) throughout the backpay period. Notwithstanding, he did not have any interim earnings until he went to work as a driver for Price Gregory International on May 28, 2015. McCallum testified that, after he was fired from M.D. Miller, he applied for work every 2 weeks, and learned about available work through internet sites like Craigslist and monster.com, by looking through local newspapers, driving by advertisements, and walking into businesses to ask if they were hiring. (Tr. 14, 21–22, 110–111, 131–32.)

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[2] Facts taken from *M.D. Miller Trucking & Topsoil, Inc.,* 361 NLRB No. 141, slip op. at 3–8.

[3] Although McCallum was later paid just over $800, he was never reinstated.

[4] The Board noted that there was "no practical difference between ordering reinstatement and ordering respondent to accept McCallum's current medical certification, which necessitates his reinstatement after his successful grievance." *M.D. Miller Trucking & Topsoil, Inc*., 361 NLRB No. 141, slip op. at 2.

[5] Citations to the transcripts will be denoted by "Tr." with the appropriate page number. Citations to the General Counsel's Exhibits, Respondent's Exhibits, Union Exhibits, and Joint Exhibits will be denoted by "GC Exh." "R. Exh." "U. Exh." and "Jt. Exh." respectively.

[6] See also, GC Exh. 1(e).

[7] The Board also granted summary judgment to specification paragraphs VIII and XIV, which both incorporate charts summarizing the total backpay obligations due to McCallum. However, the Board noted that while they find the gross backpay amounts are as alleged in the specification, the net backpay calculations are subject to the hearing ordered regarding McCallum's interim earnings and expenses. Id at 3 fn. 8.

[8] Although it was the original Charging Party, the Union did not make an appearance at the compliance hearing.

McCallum applied for, and was granted, unemployment by the State of Illinois in April 2013.[9] As part of the requirements for unemployment, McCallum testified that, every 2 weeks, he had to certify his availability to work.[10] He received unemployment through 2015, but could not remember the exact number of weeks he received benefits each year.[11] (Tr. 14–18, 123–125; GC Exhs. 2–4.)

McCallum testified that the NLRB recommended to him "very strongly" that he keep records of his job search. (Tr. 103) Notwithstanding, McCallum's documentation of his job search was not extensive.[12] For the 24-plus month backpay period, the documentary evidence of McCallum's job search consists of: (1) a job application at Peak Fitness; (2) a job application for work as a driver at Promotional Physical Therapy; (3) an internet print-out showing the web address for Holland Regional/USF Holland Trucking company; (4) an undated letter from 160 Driving Academy, stating that McCallum applied for work as a driving instructor; and (5) partially completed "Search for Work" reports, on forms provided for by the NLRB, and completed by McCallum, for 8 months (August 2013—October 2013 and June 2014—October 2014). (GC Exh. 5, 6, 7, 8, 9; R. Exh. 9; GC Exh. 9; Tr. 32.)[13] Specifically the NLRB Search for Work reports show the following contacts McCallum documented regarding his work search:

Date	Employer Name
August 2013	Pro Motion Physical Therapy
September 2103	Premier Truck Driving School, Joliet Jr. College
September 2013	160 Driving Academy
October 2013	Star Truck Driving School
June 2014	Black Horse Carriers
June 2014	USF Holland
July 2014	Toys R Us
July 2014	Renzenberger, Inc.
August 2014	EcoLab
August 2014	Calhoon Trucking
August 2014	Unknown employer, contact named "Nick"
September 2014	Home Depot
September 2014	A&R Trucking
September 2014	Craigslist Job Posting, name unknown
October 2014	Craigslist Job Posting, name unknown
October 2014	Priority Staffing

McCallum testified that he made other job applications but he did not write them down and could not remember all the places he applied to during that time. (Tr. 37, 102, 104–105, 120.) Also, in some instances he submitted job applications via company websites, but did not print-off the final application as proof of submission. (Tr. 107.)

1. Search for work in 2013

In May 2013, McCallum testified that he asked Union Business Agent Gregory Elsberry to place his name on the Union's out-of-work referral list. (Tr. 20, 125.) However, according to Elsberry, members cannot register for the referral list by asking to be put on the list. (Tr. 172.) Furthermore, Elsberry testified that it is the employee's responsibility to get on the list, and to complete and sign all the necessary paperwork required by the Union.[14] (Tr. 166.) The Union's referral list rules specifically state that employees must renew their registration on the referral list every 90 days, or their name will be removed from the list. (GC Exh. 15 p. 1.) There is no evidence that McCallum ever completed any paperwork for registration on the referral list. Respondent introduced into evidence the Union's referral list for the time period in question; McCallum's name does not appear anywhere on the list. (R. Exh. 16.)

Along with reaching out to the Union, in May 2013, McCallum applied for a front desk position at Peak Fitness, a local gym. (Tr. 26–27, 29; GC Exh. 5.) In June 2013, he applied for a general shop position with Road Therapy, a motorcycle repair shop. (Tr. 35–36.) In August 2013, he applied for a driver position at Promotion Physical Therapy. (Tr. 23, 119; GC Exh. 6.) He sought for two truckdriver instructor jobs in September 2013, one with 160 Driving Academy, for which he had an interview but was not hired, and one with Joliet Junior College—Premier Truck Driving School. (Tr. 21, 115–118; GC Exh. 8.) In October 2013, he applied for another truckdriver instructor position with Star Truck driving School in Oswego, Illinois. (Tr. 21, 115.) He testified that in 2013, he also applied

[9] While McCallum testified that he first filed for unemployment in May 2013, the documentary evidence shows otherwise. (Tr. 14–15.) The finding by the Illinois Department of Economic Security that McCallum was eligible for unemployment was mailed on April 15, 2013, and notes that McCallum's "last day worked" was on April 11. (GC Exh. 2.) Thus, McCallum must have filed for unemployment sometime between April 11 and 15.

[10] This certification was done via the telephone. (Tr. 15.)

[11] The evidence shows that McCallum's weekly unemployment benefit was $413. (GC Exh. 2.) McCallum's 1099G forms show that he received a total of $17,461 in unemployment benefits in 2013; $10,440 in 2014; and $4686 in 2015. (GC Exh. 3–4.) Based on these numbers, it is reasonable to estimate that McCallum received unemployment for significant portions of 2013—2014, and for about 11 weeks in 2015.

[12] In some instances McCallum testified that he submitted job applications via company websites, but did not print-off the final application as proof that he was submitting it over the internet. (Tr. 107.)

[13] McCallum testified that R. Exh. 9 is the most accurate out of Exhs. 7, 8, and 9. (Tr. 119.)

[14] Elsberry did speak with McCallum at least once a month, where McCallum would ask him if there was work available. Elsberry testified that he was cautious to put McCallum on a job where he would end up quitting to go back to work at Respondent. Indeed, Elsberry stated that he "did not send Ed on a couple of jobs, because" he thought McCallum was going back to work with Respondent as the Union had won the grievance on McCallum's behalf. Thus Elsberry was trying to get McCallum some type of temporary job, assuming that McCallum would be reinstated. (Tr. 126–127, 183–185.)

for a job that he saw on Craigslist with A&R Trucking, in Channahon, Illinois, and for a job at Sun Cleaners. (Tr. 128–129.) He also stopped off at a temporary employment agency in Shorewood, Illinois, named Pro Staffing, to ask if they had any positions available—however they did not hire him. (Tr. 38, 129.) Finally, regarding the job applications he documented in his "Search for Work" forms, McCallum testified that he made other job applications during August and September 2013, but he did not write them down on the form. (Tr. 116.)

2. Search for work in 2014

McCallum testified that his job search continued in 2014, using the same methods he previously used to look for employment: the internet; newspapers; posted advertisements; and walking into businesses. (Tr. 39.) In 2014, McCallum applied for jobs at Priority Staffing, Toys R Us, Renzenberger, Inc., Ecolab, Calhoun Trucking, A&R Trucking,[15] and for USF Holland.[16] (Tr. 39–46; GC Exh. 9.) He also testified that there was an unnamed employer whose job was posted on Craigslist that he applied for, and he spoke with someone at the company named "Nick." (Tr. 43.) He also applied for three other positions he saw on Craigslist—one at Home Depot and two for unnamed employers.[17] (Tr. 43–45.) In June 2014, he also applied for work at Black Horse Carriers. He testified that he applied for other employers in June and July 2014, but he did not write them down. (Tr. 40, 104–105; GC Exh. 9.)

3. Search for work in 2015

According to McCallum, he continued his job search in 2015, using the same methods to search for work. (Tr. 48.) However, McCallum testified that he could not remember any of the employers that he applied for in 2015. (Tr. 48.) Eventually, McCallum got a job as a driver with Price Gregory, through the Union. He started on May 28, 2015, transporting laborers to and from their various jobsites. (Tr. 111–113, 183.)

4. Costs incurred while searching for work

McCallum testified that he travelled approximately 50 miles while searching for work, and also had to pay $10 for records from the Department of Motor Vehicles for his application to 160 Driving Academy. (Tr. 49, 132.)

After he was fired, he also incurred health insurance related expenses. The Union allowed him to "self-pay" his health insurance, which cost him $625 per month. In total, McCallum paid $2500 to self-pay his insurance through the end of 2013. (Tr. 132, 150; GC Exh. 10–13.) McCallum also paid $61.89 to express mail his insurance checks to the Union. (GC Exh. 10–13.)

In January 2014 McCallum maintained his health insurance through his wife's employer; the monthly premium was $214 per month. (Tr. 55, 133.) Thus, through May 2015, McCallum paid $3683 for health insurance through his wife's insurance plan.[18] In total, the evidence shows that McCallum paid at total of $6224.89 to maintain his health insurance during the backpay period.

C. Respondent's Evidence of Job Availability During the Backpay Period

Respondent presented evidence to show that, during the backpay period, there were comparable employment opportunities in the relevant geographic area for McCallum.[19] At the hearing, Respondent called Derek Heider, dispatcher for "D Construction," as a witness to testify about jobs in the Chicagoland area that were available with his company. D Construction is a road construction company located in Coal City, Illinois, and its operations are at the same physical location as Respondent. D Construction employs drivers with CDL licenses, and has a CBA with the Union; it was subject to the Union's CBA during the relevant time. During the backpay period, D Construction hired 19 drivers who were members of the Union. According to Heider, the company hires drivers by having people come into the office and complete a job application. When jobs are available, they go through the completed applications on file. (Tr. 63–68; R. Exh. 1.)

Respondent also called David Allen Mashek, the director of labor relations for Prairie Material, as a witness.[20] Prairie Material is signatory to two CBAs with the Teamsters, one with the Union, and one with another local. During the years 2013–2015, Prairie Material hired 477 CDL drivers.[21] (R. Exh. 2–6; Tr. 70–83.) To hire drivers, the company calls the union hiring halls but they also advertise, because the various unions generally cannot supply the number of drivers needed by the company. (Tr. 75.) Prairie Material has no record of McCallum ever

[15] McCallum testified that the A&R Trucking application in 2014 was separate than the application he made in 2013. This was in 2014 for a dispatcher. (Tr. 46, 107.)

[16] Regarding his application at USF Holland, McCallum testified that he drove to their facility and they gave him a piece of paper with a web address to complete an application online. He then went to the website and submitted the application. (Tr. 31–32, 35; GC Exh. 7.) Although McCallum testified that he applied twice for jobs online at USF Holland (Tr. 107), the evidence from the company shows that he only submitted one application, on June 28, 2014. (R. Exh. 17.) I find that McCallum was mistaken in his testimony about applying twice to USF Holland, and that the credited evidence shows that he only applied once, as shown by the company's records.

[17] One of the Craigslist jobs was with a local trucking company driving in rail yards; however they were looking for someone with rail yard experience. McCallum could not remember the name of the company, but spoke to somebody named "Bill." (Tr. 130–131.)

[18] McCallum also testified that he had a higher deductible when he switched to his wife's insurance plan, going from a $300 deductible to $350, and a higher out-of-pocket expense, going from $2000 to $4350. (Tr. 59–60.) After that amount, everything was covered 100 percent. (Tr. 59–60.) However, no evidence was introduced that McCallum met these threshold amounts, and therefore incurred any increased out-of-pocket expenses because of these higher levels.

[19] See *St. George Warehouse*, 351 NLRB 961, 967 (2007) (when "respondent raises a job search defense and satisfies its burden of coming forward with evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search.")

[20] Prairie North America, which is located in a Chicago suburb, is the local brand name for Votorantin North America. (Tr. 70–71.)

[21] This number is for Prairie Material facilities in Illinois, Indiana, and Wisconsin. (Tr. 85.) For the 218 drivers hired in 218, the company had between 1600–1700 applicants. (Tr. 87.)

applying for a job with the company during the backpay period. (Tr. 71.) Evidence was also presented about the hiring done by USF Holland, another company that hires drivers in the area. During the period of April 22, 2013, through June 1, 2015, the company hired 592 drivers in Illinois.[22]

II. LEGAL STANDARD

"Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings. *St. George Warehouse*, 351 NLRB 961, 963 (2007) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d, 170, 175 (2d Cir. 1965)). A claim that a discriminatee did not make reasonable efforts to find interim employment, and thus failed to mitigate damages, is an affirmative defense for which the employer bears the ultimate burden of proof. *St. George Warehouse*, 351 NLRB 961, 961 (2007). The Board has noted that "[t]he term 'burden of proof' typically encompasses two separate burdens:" (1) producing evidence, satisfactory to the trier of fact, of a particular fact at issue—referred to as the "burden of production;" and (2) the burden of persuading the trier of fact that the alleged fact is true—referred to as "the burden of persuasion." Id at 963 (*citing McCormick on Evidence*, Section 336 (4th Ed. 1992)).

In *St. George Warehouse*, the Board set forth a burden-shifting standard regarding the issue of mitigation, noting that "[t]he contention that a discriminate has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area,[23] and (2) the discriminate unreasonably failed to apply for these jobs." 351 NLRB at 961. The respondent-employer has the burden of going forward with evidence to show that there were substantially equivalent jobs within the geographic area. Id. If the respondent satisfies this burden, then "the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search." Id at 967. The General Counsel may meet this burden by producing the discriminatee to testify as to his efforts at seeking employment," or by introducing other competent evidence regarding the discriminatee's job search.[24] Id at 964.

Significantly, in *St. George Warehouse*, the Board "modif[ied] the principles governing the issue of willful loss of earnings in one respect only." Id. at 964. "When a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period . . . the General Counsel [has] the burden of producing evidence concerning the discriminatee's job search." Id. at 964. The Board did not make any changes to the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; "the burden remains on the respondent to prove that the discriminatee did not mitigate his damages 'by using reasonable diligence in seeking alternate employment.'" Id at 964 (citing *Mastro Plastics*, 354 F.2d 170, 175 (2d Cir. 1965)

III. ANALYSIS

Respondent asserts that McCallum is entitled to no backpay, because he failed to mitigate damages throughout the backpay period. Applying the burden-shifting framework set forth in *St. George Warehouse,* I find that the credible evidence shows otherwise; Respondent has failed to satisfy its ultimate burden of showing that McCallum failed to mitigate damages.

Respondent met its initial burden by presenting "evidence that there were substantially equivalent jobs within the relevant geographic area available for [McCallum] during the backpay period." *St. George Warehouse*, 351 NLRB at 964. The evidence showed that at least three companies in the area hired over 1000 drivers with CDL's during the relevant period. As such, the burden shifted to the General Counsel to produce competent evidence showing the reasonableness of McCallum's job search. Id at 967. The General Counsel met this burden.

Almost immediately after Respondent's discrimination against McCallum, he applied for, and was granted, unemployment by the State of Illinois. *Synergy Gas Corp*., 302 NLRB 130, 131 (1991) (in making an adequate search for employment, discriminatee registered for unemployment and began speaking with counselor about available positions within a few days of his termination). In Illinois, an individual can receive unemployment benefits only if he "was actively seeking work for the period in question." *Moss v. Department of Employment Sec.*, 830 N.E.2d 663, 668 (2005) (*citing* 820 ILCS 405/500 (West 2002)). McCallum received unemployment for 2013, 2014, and 2015, thereby satisfying the job search requirements set forth by the State of Illinois during these periods. "Board precedent establishes that '[t]he receipt of unemployment compensation pursuant to the rules regarding eligibility constitute prima facie evidence of a reasonable search for interim employment.'" *NLRB v. KSM Industries, Inc.*, 682 F.3d 537, 548 (7th Cir. 2012) (quoting *Taylor Machine Products*, 338 NLRB 831, 832 (2003)).

McCallum testified that he applied for work every 2 weeks, and found out about potential jobs through local newspapers, driving by advertisements, cold-calling potential employers, and by using internet sites like monster.com and Craigslist.[25] For 2013, the evidence shows that McCallum sought employment from: Pro Motion Physical Therapy; Premier Truck Driving School—Joliet Jr. College; 160 Driving Academy; Star

[22] Of the 592 drivers hired, 502 were full-time drivers and 90 were part time. (R. Exh. 17.)

[23] This first element of the defense can be met by presenting sufficient evidence of comparable employment opportunities in the relevant job market. *St. George Warehouse*, 351 NLRB at 961.

[24] Regarding a discriminatee's job search, in trying to secure comparable employment, a wrongfully-discharged "worker is not held to the highest standard of diligence." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001). Instead, "reasonable exertions" are sufficient. Id. See also, *Retail Delivery Systems, Inc.,* 292 NLRB 121, 125 (1988); *Synergy Gas Corp*., 302 NLRB 130, 131 (1991)

[25] In determining the reasonableness of McCallum's job search, I do not rely on the General Counsel's argument that McCallum utilized the Union's hiring hall and that he was placed on the Union's out-of-work referral list. GC Br. at 4. The evidence showed that McCallum did not follow the Union's referral list requirements, and that he never completed paperwork to register for the referral list. Moreover, McCallum's name did not appear anywhere on the Union's referral list.

Truck Driving School; Peak Fitness; Road Therapy; A&R Trucking; Sun Cleaners; and Pro Staffing. For 2014, McCallum inquired about work at: Black Horse Carriers; USF Holland; Toys R Us; Renzenberger, Inc.; EcoLab; Calhoon Trucking; Priority Staffing; Home Depot; A&R Trucking; two unknown employers he found on Craigslist; and another unknown employer where he spoke to someone named "Nick." McCallum could not remember any of the employers that he applied for in 2015, but testified that he used the same methods to search for work as he did in 2013 and 2014.[26] During the relevant period, McCallum also testified that, at various times during the backpay period, he made other job applications but did not write them down and could not remember all the applications he made during that time.

It appears that McCallum's situation here is similar to one of the individuals in *United States Can Co.*, 328 NLRB 334, 344 (1999), where the employer claimed that one of the workers did not mitigate damages because his search-for-work form showed only five to seven contacts per quarter in 1 year, and none for 2 consecutive years thereafter. However, the employee had credibly explained that his search-for-work form did not include all the job contacts he made during the backpay period. The Board affirmed the trial judge who noted that "given that he collected state unemployment benefits for at least 6-months following his layoff, it is reasonable to assume [the discriminatee] would have made at least three job contacts per week, as was required by the State of Illinois." Id. Moreover, the fact the discriminatee was unable to recall more names of employers to include in his search forms "is neither unusual nor suspicious, and indeed readily understandable, and does not automatically disqualify him from receiving backpay." Id. The Seventh Circuit enforced the Board's decision. *United Can Co. v. NLRB*, 254 F.3d 626 (7th Cir. 2001)

The same holds true here. McCallum credibly explained that his search for work forms did not include all the job contacts he made during the backpay period, and his lapse of memory is "neither unusual nor suspicious, and indeed readily understandable." *United States Can Co.*, 328 NLRB at 444. Moreover, his receipt of unemployment benefits throughout the backpay period is prima facie evidence of a reasonable search for interim employment." *NLRB v. KSM Industries, Inc.*, 682 F.3d 537, 548 (7th Cir. 2012). As such, I find that the General Counsel has produced competent evidence showing the reasonableness of McCallum's job search. The Respondent has not met its ultimate burden to prove "that the discriminatee did not mitigate his damages by using reasonable diligence in seeking alternate employment." *St. George Warehouse*, 351 NLRB at 964. Accordingly, I find that Respondent owes McCallum $145,714 in net backpay, plus interest, as set forth in the Specification.[27]

The General Counsel also seeks reimbursement for McCallum's health insurance premiums, over and above what he would have paid had he been working at Respondent, during the backpay period. The Board customarily includes reimbursement of substitute health insurance premiums in make-whole remedies. *Seaport Printing & Ad Specialties, Inc.*, 2011 WL 3663398, at *3 (August 18, 2011) (unpublished order). The evidence shows that it cost McCallum a total of $6224.89 to maintain his health insurance during the backpay period.[28] As such, I find that Respondent also owes McCallum $6224.89 for health insurance replacement costs.

The General Counsel further seeks reimbursement for mileage expenses of $28, and $10 in expenses for records obtained from the Department of Motor Vehicles. The evidence introduced at hearing supports these expenses. McCallum testified that he drove about 50 miles while searching for work, and needed the driving records, which cost $10, for his job application at 160 Driving Academy. Thus, I find that Respondent also owes McCallum $38 for his search for work expenses.

Finally, the Board granted summary judgment as to the pension fund payments and excess tax assessments in the Specification. *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49 (2015), slip. op. at 3. Therefore, Respondent also owes McCallum $7984 in excess tax assessments, and $15,876 in pension fund contributions.

Accordingly, based on the above findings and the record as a whole, I issue the following supplemental

ORDER

The Respondent, M.D. Miller Trucking & Topsoil, Inc., Rockdale, Illinois, its officers, agents, successors, and assigns, shall make whole Edward McCallum as follows:

1. Pay to McCallum the following amounts:

Net backpay:	$145,714.00
Health insurance expenses:	$6,224.98
Search for work expenses:	$38.00

plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of

[26] The fact McCallum could not recall any specific employers for 2015 is a more concerning than his memory lapses for the earlier years; in 2013 and 2014 there also existed documentary evidence regarding his job search. However, McCallum did ultimately gain employment in May 2015, which supports a finding that he was actively seeking employment during that time. Moreover, it is not disputed that McCallum received unemployment insurance payments from the State of Illinois during 2015, for approximately 11 weeks, which is "prima facie evidence of a reasonable search for interim employment." *KSM Industries, Inc*., 682 F.3d at 548.

[27] I note that adding the "Net" backpay column in "Table A" of the Specification shows that the total "Net" backpay is $145,713, not $145,714 as stated in the Specification. However, the $1 error is due to the quarterly "Net" backpay numbers being rounded to the nearest dollar. Absent the rounding of the quarterly backpay numbers, the total net backpay is $145,714.

[28] "Table A" of the Specification states that McCallum incurred $8,588 in medical expenses. However, the evidence introduced at hearing only shows expenses of $6,224.89. While McCallum testified that deductibles and out-of-pocket thresholds increased with his post-discrimination insurance plans, no evidence was introduced that he actually had to pay any deductibles, or any out-of-pocket expenses whatsoever.

payment, minus tax withholdings required by Federal and State law;

2. Pay McCallum $7,984.00 for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014); and

3. Pay the Local 179 Pension Fund the amount of $15,876.00 on behalf of McCallum plus any applicable interest and/or penalties.

Dated, Washington, D.C. November 4, 2016